

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statutes and regulations involved.....	2
Statement.....	2
Argument.....	4
Conclusion.....	8
Appendix.....	9

CITATIONS

Cases:

<i>Bogardus v. Commissioner</i> , 302 U. S. 34.....	8
<i>DeWitt v. Richmond County</i> , 192 Ga. 770.....	6
<i>Flaraheim v. United States</i> , 156 F. 2d 105.....	7
<i>Hollis v. Jones</i> , 184 Ga. 273.....	6
<i>Miller v. Commissioner</i> , 144 F. 2d 287.....	5
<i>Sutro v. United States</i> , decided June 16, 1942.....	7
<i>Trotzler v. McElroy</i> , 182 Ga. 719.....	6
<i>West v. Anderson</i> , 187 Ga. 587.....	6

Statutes and Georgia Constitution:

Internal Revenue Code, Sec. 22 (26 U. S. C. 22).....	4, 16
Constitution of the State of Georgia, Art. 7, Sec. 16.....	8
Georgia Laws (1924), pp. 167-173, Act No. 454, approved August 13, 1924.....	5, 9
Sec. 1.....	11
Sec. 2.....	6, 12
Sec. 3.....	12
Sec. 4.....	6, 12
Sec. 5.....	12
Sec. 6.....	7, 13
Sec. 7.....	7, 13
Sec. 8.....	13
Sec. 9.....	13
Sec. 10.....	14
Sec. 11.....	14
Sec. 12.....	14
Sec. 13.....	7, 14
Sec. 14.....	15
Sec. 15.....	15
Sec. 16.....	15
Sec. 17.....	15
Sec. 18.....	15
Sec. 19.....	15
Sec. 20.....	15
Sec. 21.....	16
Sec. 22.....	16

II

Statutes and Georgia Constitution—Continued		Page
Georgia Laws (1925), pp. 194-198, Act. No. 159, approved		
August 7, 1925, Sec. 2.....		6, 16
Miscellaneous:		
I. T. 3329, 1939-2 Cum. Bull. 153.....		4
I. T. 3362, 1940-1 Cum. Bull. 18.....		4
I. T. 3653, 1944 Cum. Bull. 75.....		4
L. O. 1040, 3 Cum. Bull. 120 (1920).....		5
T. D. 3112, 4 Cum. Bull. 76 (1921).....		5
Treasury Regulations 45, Art. 32.....		4
Treasury Regulations 103, Sec. 19.22 (a)-2.....		19
Treasury Regulations 111, Sec. 29.22 (a)-2.....		4, 17

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 851

AMY H. VARNEDOE, PETITIONER

v.

**MARION H. ALLEN, COLLECTOR OF INTERNAL
REVENUE**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT**

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

There is no opinion of the District Court. The District Judge, on June 4, 1946, filed his findings of fact and conclusions of law. (R. 35-39.) The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 44-50) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 22, 1946. (R. 50.) Petition for a writ of certiorari was filed on January 4, 1947. Jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether monthly payments received by the taxpayer, the widow of an officer of the Atlanta Fire Department, by virtue of an Act of the General Assembly of the State of Georgia, constitute taxable income to her under Section 22 (a) of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 9-19.

STATEMENT

This case was heard before the District Court on a stipulation of facts (R. 31-33), which may be summarized as follows:

The taxpayer is the widow of Lewis Carroll Varnedoe, who, during his lifetime, was a captain in the Fire Department of the city of Atlanta, Georgia. Captain Varnedoe died on December 20, 1931, at the age of 70, after having served approximately 42 years with the Fire Department of the city of Atlanta. At the time of his death he was employed by the Fire Department of Atlanta. (R. 31, 36.)

Captain Varnedoe's widow, the taxpayer, commenced receiving payments of \$100 per month, from the city of Atlanta, Georgia, beginning January 1, 1932, and continuously received payments

in this amount up to the date of the trial of this case. These payments were received by the taxpayer pursuant to an act of the General Assembly of the State of Georgia, approved August 13, 1924 (Ga. Laws 1924, pp. 167-173), as amended by acts approved August 7, 1925 (Ga. Laws 1925, pp. 194-198), August 24, 1931 (Ga. Laws 1931, pp. 223-228), and March 28, 1935 (Ga. Laws 1935, pp. 450-456). (R. 32, 36.)

The taxpayer has never, at any time, been employed by or rendered services to the city of Atlanta, and has never, at any time, paid or given any personal consideration whatsoever in exchange for the payments she has received from the city of Atlanta pursuant to the foregoing acts of the General Assembly of the State of Georgia. (R. 32, 37.)

The salary which Captain Varnedoe received from the city at Atlanta from 1924 to the date of his death amounted to \$200 per month, and during that period, deductions were made from his salary as provided by the above cited acts of the State of Georgia. (R. 32, 37.)

On November 27, 1944, the taxpayer paid to the Collector of Internal Revenue income tax for the year 1941 in the amount of \$83.01 plus \$13.28 in interest, and the amount of \$259.74 plus \$9.36 in interest, for the year 1943. On January 2, 1945, she paid a tax of \$261.51 for the year 1944. (R. 32-33, 37.)

The taxpayer duly and timely filed claims for refund of the above taxes and interest (R. 33, 37), which claims were rejected by the Commissioner of Internal Revenue (R. 37).

The District Court sustained the Commissioner's determination and dismissed the taxpayer's bill of complaint. (R. 39.) The Circuit Court of Appeals for the Fifth Circuit affirmed. (R. 46.)

ARGUMENT

The Circuit Court of Appeals, affirming the District Court, held, correctly we submit, that the payments in question were taxable income within the meaning of Section 22 (a) of the Internal Revenue Code (Appendix, *infra*). Treasury Regulations 111, Section 29.22 (a)-2 (Appendix, *infra*), provides¹ that, "pensions or retiring allowances * * * are income to the recipients."

¹ These Regulations have remained substantially unchanged since the Revenue Act of 1918. See Treasury Regulations 45, Article 32 (1920 ed.). The basis for petitioner's statement (Br. 12) that for many years the Bureau of Internal Revenue interpreted the revenue law to mean that a pension such as the one here involved is not taxable is not clear. The taxpayer refers not to a ruling of the Bureau but to a letter from the Collector giving his opinion. In I. T. 3329, 1939-2 Cum. Bull. 153, it was ruled that payments to the widow of a corporate officer were not taxable, but in that case there was no contractual obligation. Cf. I. T. 3362, 1940-1 Cum. Bull. 18; I. T. 3653, 1944 Cum. Bull. 75. In the latter two rulings it was held that under Section 22

One exception to this general rule is stated in the following language:

However, so-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and are not taxable.

The taxpayer concedes (Br. 7) that "the money with which we are now dealing was paid as a pension." But she contends that because it was paid to her as the widow of a deceased fireman it was a gift or gratuity within the meaning of the above-quoted exception. The Regulations clearly except only those "so-called" pensions which are paid by someone who has received no services. An example of their intended application is retiring allowances made to teachers or their widows by the Carnegie Foundation for the Advancement of Teaching. See L. O. 1040, 3 Cum. Bull. 120 (1920). The Act of the General Assembly of Georgia (Appendix, *infra*), under which the taxpayer received her right to the payments

(b) (2) of the Internal Revenue Code the amounts received each year less three percent of the contributions made by the employee could be excluded from income until the total contributions were recovered. See also, T. D. 3112, 4 Cum. Bull. 76 (1921), relating to payments made to retired federal employees and *Miller v. Commissioner*, 144 F. 2d 287 (C. C. A. 4th). Unless a different result is required because the contributions here were labelled a tax, the payments here would apparently be taxable under that section. But the result would be the same since the tax could not have exceeded \$168 (one percent of \$2,400 for seven years) and that amount was recovered before the tax years here involved.

in question was first enacted in 1924 and is entitled "Pensions for Firemen In Certain Cities; Payments In Case Of Accident, Death, etc." Its first stated purpose is to provide that cities furnish aid, relief and pensions to members and future members of paid fire departments and their dependents in specified cases. Section 4 of the Act (Appendix, *infra*) states:

When such member shall retire as a matter of right he shall be paid one-half of the salary he was receiving at the time of his retirement, for the rest of his life, to be paid monthly. In case of death of a pensioner his widow and children shall draw his pension as herein provided in case of death of member of such department.

In 1925 the Act was amended to provide *inter alia* that "when any fireman who has served twenty-five years and is in active service at the time of his death dies, his widow shall receive the pension he might have taken; during her widowhood." Section 2 (Appendix, *infra*) p. 16.²

Under the decisions of the Supreme Court of the State of Georgia the taxpayer acquired a vested contractual right, upon the death of her husband, to the payments in question. *Trotzier v. McElroy*, 182 Ga. 719; *Hollis v. Jones*, 184 Ga. 273; *West v. Anderson*, 187 Ga. 587; *DeWitt v. Richmond County*, 192 Ga. 770.

² The taxpayer's husband was in the active service of the Atlanta fire department at the time of his death, and had been in that service for more than 25 years. (R. 31.)

It is generally held that payments made to beneficiaries of deceased employees are taxable income to the beneficiary when the payments are enforceable obligations of the payor. *Flarsheim v. United States*, 156 F. 2d 105 (C. C. A. 8th); *Sutro v. United States* (N. D. Calif.), decided June 16, 1942 (1942 P-H, par. 62807; 30 A. F. T. R. 1618). Even if such payments are not regarded as compensation in a technical sense, they are nevertheless income because derived from obligations based on the employer-employee relationship and in no sense constitute gifts within the meaning of Section 22 (b) (3) of the Internal Revenue Code. There is no merit to taxpayer's contention (Br. 11-12) that the board of trustees rather than the City of Atlanta awarded the payments in question. Sections 6, 7 and 13 of the Act of the General Assembly of Georgia (Appendix, *infra*) clearly show that a board of trustees was established merely to administer the funds which the city collected,³ for the purpose of paying pensions in consideration for services rendered the city.

The court below correctly held that the payments received by the taxpayer were not voluntary gifts or gratuities from the City of Atlanta

³ The funds were obtained by the City of Atlanta by levying a tax of one percent on the salaries of firemen in active service and by levying a tax against the premiums of all fire and lightning insurance companies on property situated within the city corporate limits. (Appendix, *infra*, pp. 13-14.)

but were pension payments received under an accrued statutory right. In fact, the legislature had no authority to authorize any gratuities or donations.⁴ This would seem to dispose of any contention that the payments were intended as gratuities. The situation is thus totally different from that in *Bogardus v. Commissioner*, 302 U. S. 34, on which the petitioner relies. There is no conflict of decisions and the fact that the issue has arisen so infrequently in the past suggests that there is no need for further judicial review.

CONCLUSION

The decision is correct and the petition should be denied.

Respectfully submitted,

GEORGE T. WASHINGTON,
Acting Solicitor General.

SEWALL KEY,
Acting Assistant Attorney General.

HELEN R. CARLOSS,
MURIEL S. PAUL,
Special Assistants to the Attorney General.

FEBRUARY, 1947.

⁴ The Constitution of the State of Georgia, Article 7, Section 16 (Georgia Code Annotated, Sec. 2-6401), entitled "Donations forbidden," provides that the General Assembly shall not by vote, resolution or order grant any donation or gratuity, in favor of any person, corporation or association.

APPENDIX

Georgia Laws (1924), pp. 167-173, Act No. 454,
approved August 13, 1924:

**PENSIONS FOR FIREMEN IN CERTAIN CITIES;
PAYMENTS IN CASE OF ACCIDENT, DEATH,
ETC.**

No. 454

An Act to provide that cities having a population of more than one hundred and fifty thousand (150,000) by the United States census of 1920 or any subsequent census shall furnish aid, relief and pensions to members of paid fire departments now in active service, and whose names are on the pay roll of such department and to future members, and their dependents in specified cases. To provide how such members who have served twenty-five years may be retired for life on half pay. To provide how such members shall be paid in case of total disability resulting from such service, and how such total disability may be determined. To provide for relief in case of sickness or accident resulting from such service. To provide for the relief of dependents and to provide for widows and children of deceased pensioners to be paid in case of death of any such member resulting from said service. To provide that such cities shall levy tax of one (1%) per centum on the salaries of such members in active service and on pay roll and to future mem-

bers to raise in part the funds to pay such aids, reliefs and pensions, collectible monthly. To provide that such cities shall use one-fifth ($\frac{1}{5}$) of the tax collected on fire and lightning insurance companies or associations from the premiums thereof on property situated within the corporate limits of such cities; to pay such aid, relief and pensions. To provide that such cities shall levy a tax of one and one-fourth ($1\frac{1}{4}$) per centum on the premiums of such fire and lightning insurance companies on property situated within the corporate limits of such cities. To provide that one and one-fourth ($1\frac{1}{4}$) per centum shall be the limit which such cities shall be allowed to tax the premiums of such fire and lightning insurance companies or associations on premiums collected on property situated in the corporate limits of such cities. To provide how such funds shall be collected, deposited and managed for the members of such fire departments now in active service and whose names are on the pay roll of such departments and for future members. To create a board of trustees and provide for their selection and election, to manage, deposit, disburse upon order and invest said funds which shall be raised by the one (1) per centum tax on the salaries of members now in active service and future members, and one-fifth ($\frac{1}{5}$) of the premium tax on fire and lightning insurance taxes. To provide that this Act shall not repeal nor in any wise affect any benefit or pension now being paid to those who were receiving the same prior to the passage of this Act;

and that this Act shall not apply to those receiving pensions or benefits prior to the passage of this Act. To provide that such board of trustees shall make all necessary rules for carrying out the terms of this Act. To provide that in case there shall at any time be on hand less funds than are needed, the actual funds shall be prorated among the beneficiaries. To provide that none of the funds mentioned shall be subject to attachment, garnishment, judgment; nor shall they be assignable; but shall be paid in cash to the beneficiary if so requested by him or her. To provide that if any part of this Act shall be held unconstitutional, the remainder of this Act shall remain in force taken in connection with existing laws. To provide that this Act shall not affect nor be affected by any workmen's compensation act or other similar laws. To repeal conflicting laws, and for other purposes.

SECTION 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this Act there shall be raised and established funds for the aid, relief and pension of members of paid fire departments who are in active service at the time of the passage of this Act and whose names are on the pay roll of such departments and future members of such departments, and their dependents in all cities in Georgia having a population of more than one hundred and fifty thousand (150,000) by the United States census of 1920 or any subsequent census of the United States.

SEC. 2. Be it further enacted that any member of such fire department who is in active service at the time of the passage of this Act and whose name is on the pay roll, and future members, may as a matter of right, retire from active service, provided he shall have served twenty-five (25) years in active service at the time of his retirement.

SEC. 3. Be it further enacted that any member of such department who is in active service at the time of the passage of this Act and whose name is on the pay roll and future members who shall be injured or whose health shall become permanently impaired to such an extent as to render him totally disabled as a result of such service shall upon application be retired. Should the board of trustees refuse to grant an order of retirement, the applicant shall select a physician, the board shall select a physician, and the two physicians so selected shall select a third. These three shall examine the applicant and determine whether he is totally disabled and the decision of a majority of these physicians shall be final on the question.

SEC. 4. When such member shall retire as a matter of right he shall be paid one-half of the salary he was receiving at the time of his retirement, for the rest of his life, to be paid monthly. In case of death of a pensioner his widow and children shall draw his pension as herein provided in case of death of member of such department.

SEC. 5. When such member shall be retired for total disability he shall be paid one-half of the salary he was receiving at the time of his retirement for the rest of his life, to be paid monthly, but this Act

shall not affect the salary of a member in active service, except the tax or one (1) percent thereon.

SEC. 6. Be it further enacted that there is hereby established, to serve without pay, a board of trustees whose duties it shall be to manage said funds which shall be kept by the City Treasurer of such cities as a separate fund and covered by his bond as such. The board of trustees shall consist of the city treasurer, the city comptroller, the chief of the fire department and two members of the fire department to be elected by the members of said department in active service on the first Monday in September every year after the passage of this Act. These two members of the department to serve one year and until their successors are elected. The city comptroller, city treasurer and chief of the fire department to be permanent members of the board.

SEC. 7. This board shall make all rules for the payment of said funds to those entitled to receive the same. It shall have its first meeting on Wednesday following the first Tuesday in September after the passage of this Act and organize by electing a chairman, a vice-chairman who shall serve when the chairman is absent, and a secretary. The chairman shall sign all vouchers for the disbursements of the fund and his written order shall fully protect the city treasurer in the payment of the same. A majority of the board shall control on all questions.

SEC. 8. The board shall make its own rules as to times and places of meetings.

SEC. 9. A tax of one (1) per centum shall be levied on the salaries of all members in active service at the time of the passage of this

Act monthly; and the city treasurer shall retain that amount from their salaries.

SEC. 10. A tax of one and one-fourth ($1\frac{1}{4}$) per centum shall be levied against the premiums of all fire and lightning insurance companies or associations on property situated within the corporate limits of such cities, and returns by said companies or associations made and tax collected as now provided by ordinance in such cities, to be collected from and after passage of this Act. One-fifth ($\frac{1}{5}$) of the tax provided in this section shall go to aid, relief, and pension funds provided in this Act.

SEC. 11. The city treasurer shall keep separate and apart from other monies in his possession the funds raised in Sections 9 and 10 hereof for the sole uses mentioned in this Act, and subject to the orders of said board of trustees.

SEC. 12. The said city tax on insurance premiums on property situated in the corporate limits of such cities shall be and is hereby limited to one and one-fourth ($1\frac{1}{4}$) per centum.

SEC. 13. The board of trustees shall formulate rules for taking care of members in active service at the time of the passage of this Act while temporarily sick or hurt, and paying the expense thereof. The board of trustees shall formulate rules for paying the pension of a member of the department who loses his life in the service to his widow till she dies or remarries; and for paying to widow and children pension of deceased pensioner; and for paying the pension of such deceased fireman to his orphan children till they reach the age of sixteen; provided the total payments to widow and orphan or orphans shall not

exceed one-half the pay of such deceased fireman. The trustees shall keep a strict account of the disbursements and receipts of all funds which shall be open at all times to public inspection.

SEC. 14. In case a member has served twenty-five year does not desire to retire, and the board of trustees deem such member incapable of further service in the department; the same proceeding shall be had as that to determine the condition of a disabled fireman as set forth in Section three (3) hereof. The decision shall be final.

SEC. 15. The city attorney shall without extra compensation render such legal service as such board of trustees shall require.

SEC. 16. In case there should accumulate more funds than should be needed for immediate use, the board of trustees are empowered to invest such excess funds in United States, Georgia, or municipal bonds; but not otherwise.

SEC. 17. Be it further enacted that none of the funds herein mentioned shall be subject to attachment, garnishment, judgment; nor shall they be assignable; but shall be paid in cash to the beneficiary if so requested by him or her.

SEC. 18. Be it further enacted that if any part of this Act shall be held unconstitutional, the remainder of this Act shall be of full force and effect provided the general terms of this Act can still be carried out.

SEC. 19. Be it further enacted that this Act shall not repeal nor in any wise affect any benefit or pension now being paid to those who were receiving the same prior to the passage of this Act.

SEC. 20. Be it further enacted that the plan and purpose of this Act is to furnish

aid, relief and pension to aged and disabled firemen who are now or may be in the future in the active service of such departments and on the pay roll of such departments and to their dependents. That the taxation herein provided is a part of the general purpose of this Act to accomplish this end.

SEC. 21. Provided this Act shall not affect or be affected by any workman's compensation law, or other similar laws.

SEC. 22. Be it further enacted that all laws and parts of laws in conflict herewith, be and the same are hereby repealed.

Georgia Laws (1925), pp. 194-198, Act No. 159, approved August 7, 1925:¹

FIREMEN'S PENSIONS IN CERTAIN CITIES, ACT OF 1924 AMENDED

* * * * *

SEC. 2. Be it further enacted, that there be added to said Act a section to be known as Section 14 (a) as follows: Be it further enacted that when any fireman who has served twenty-five years and is in active service at the time of his death dies, his widow shall receive the pension he might have taken; during her widowhood.

* * * * *

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.* — "Gross income" includes gains, profits, and income derived from salaries, wages, or compensa-

¹The Act of 1924 was again amended in 1931 (Georgia Laws (1931), p. 223) and in 1935 (Georgia Laws (1935), p. 450), but these amendments do not affect the question in this case.

tion for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly.

* * * * *

(26 U. S. C. 22.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.22 (a)-2. *Compensation for Personal Services.*—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by the United States (unless expressly exempt) or by private persons are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. However, so-called pensions awarded by one

to whom no services have been rendered are mere gifts or gratuities and are not taxable. The salaries of Federal officers and employees are subject to tax. Amounts deducted and withheld pursuant to the Civil Service Retirement Act of May 29, 1930, 46 Stat. 468, 475, as amended (5 U. S. C., 1940 ed., ch. 14), from the basic salary, pay, or compensation of the employees in the civil service of the United States are includible in gross income for the year in which deducted and withheld. As used in this section the term "Federal officers and employees" includes all judges of courts of the United States irrespective of when they took office. Compensation received for services rendered as an officer or employee (including a member of a legislative body and a judge or officer of a court) of a State or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing, is to be included in gross income, regardless of the nature of the office or employment.

The value of services need not be included in gross income when rendered directly and gratuitously to an organization described in section 23 (o). Where, however, pursuant to an agreement or understanding services are rendered to a person for the benefit of an organization described in section 23 (o) and an amount for such services is paid to such organization by the person to whom the services are rendered, the amount so paid constitutes income to the person performing the services even though at the time of the agreement or understanding the person making the payment acknowledges his liability to make payment to such organization. The second sentence of this para-

graph shall not apply where such an agreement or understanding has been entered into prior to May 14, 1942 (the date of the approval of Treasury Decision 5151).

Section 19.22 (a)-2 of Treasury Regulations 103, promulgated under the Internal Revenue Code, as amended by T. D. 5151, 1942-1 Cum. Bull. 34, is substantially the same as the above quoted Section of Treasury Regulations 111.